

**Testimony**  
presented by  
**Mary Burgan, General Secretary**  
before the  
**Public Hearing held by the Copyright Office**  
**January 26, 1999**

I appreciate this opportunity for you to hear from faculty who both use and create intellectual property in the distance education context. Prior to my becoming General Secretary, I taught English at Indiana University in Bloomington, Indiana for many years, and continue to identify myself as a teacher. The American Association of University Professors ("AAUP") is the national organization serving the academic profession and college and university faculty members. The Association has some 44,000 faculty members at colleges and universities throughout the country and has long been viewed as the authoritative voice of the academic profession. As academics from all scholarly disciplines, our members deal with intellectual property issues every day, both as creators and as users. This makes us especially sensitive to the tensions inherent in our nation's intellectual property tradition.

In our daily work members of AAUP strive to maintain the delicate balance between the rights of the creator and the dissemination of knowledge for the public benefit.

Since its founding in 1915, the main work of the Association has been defending the principles of academic freedom and mechanisms to ensure those principles such as tenure, shared governance, and due process. Two of these concepts--academic freedom and shared governance inform our analysis of distance education policy.

**Academic Freedom**

Our 1940 *Statement of Principles on Academic Freedom and Tenure*, a joint enterprise with the Association of American Colleges, has been endorsed by 160 learned societies and educational organizations. The substantial number of endorsing bodies along with the fact that hundreds of colleges and universities have invoked the *Statement* in their regulations or handbooks attest to the normative value of the statement.

The purpose of the 1940 *Statement* is:

to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of

either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

The *Statement* goes on to elaborate:

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

### **Shared Governance**

In 1966, the AAUP adopted the widely endorsed *Statement on Government of Colleges and Universities*. This statement, with its call for shared responsibility among the different components of institutional government and its specification of areas of primary responsibility for governing boards, administrations, and faculties, remains the Association's central policy document relating to academic governance.

In relevant part, the statement provides:

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.

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The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

These two fundamental policy statements, along with a wide range of Association policies are published in a compilation volume entitled *AAUP Policy Documents & Reports*, often referred to within the academy as the "Redbook." The importance of our dedication to the principles of academic freedom and sound academic practice finds support from no less an authority than the U.S. Supreme Court. In the 1967 decision *Keyishian v. Board of Regents*, Justice William Brennan, writing for the Court, stated that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned."

### **Distance Education in the context of Academic Freedom and Shared Governance**

First, let me say quite candidly that the promotion of distance learning technology into higher education by forces outside of the academic community is a not-uncontroversial proposition for us. The Association believes that there are serious concerns in terms of both academic freedom and shared governance, as well as the quality of education being provided in the institutions of higher education in our country. Our fundamental concern is the quality of education, and we

believe in the primacy of the teaching/learning relationship--the engagement of teachers and students with each other--as the surest guarantee of that quality. That principle has guided Association evaluations of developments in technology-based education, which began in the 1930s, with examinations of the impact of radio on higher education, and will take us forward as we increase the use of newer technologies in education.

Distance education programs are increasingly being promoted by policymakers, critics, and reformers of higher education, who look on it as a more cost-effective way to deliver educational services to a wider, more varied audience than ever before. Despite mixed evidence as to its effectiveness or appropriateness in some aspects of higher education, the political pressure to implement distance learning continues to grow rapidly across the country. I only need to point to section 403 of the Digital Millennium Copyright Act which has brought us together today to illustrate this point.

Neither critics nor promoters of distance education want to see technology misapplied or curricula adulterated through inadequate or inappropriate application. As an association of teachers, AAUP's first priority is pedagogical. Many faculty members feel an instinctive wariness toward the actual implementation of distance learning programs, but we also have concerns about being viewed as impediments to progress, rather than as reasonable critics of a developing--but as yet unproven--idea.

As with any advance in technology, the promise of distance education has been overstated by boosters. Ultimately, I believe that like other innovations, distance education will join other media in the constellation of techniques used to support the teaching-learning process, rather than causing a wholesale revolution in methodology.

For example, it is frequently claimed that distance education is cheaper and therefore utilized more in times of shortage of resources. In reality, the cost equation is rarely that simple. Although the college may need less in the way of buildings and campus infrastructure, there will be a need for communication technology infrastructures, support networks, supplementary services for marketing, registration, library access, advising, and testing beyond the campus. The bottom line is that developing distance learning requires significant changes in the practice of both faculty and students to ensure an appropriate learning environment.

### **Association Recommendations in regard to Distance Education**

In short, the Association welcomes the promotion and implementation of effective and appropriate distance-education programs, provided that the maintenance of academic and educational quality defines the course of such implementation. We believe that the active involvement of the faculty in designing and implementing these programs is the best way to accomplish these aims, and we are working to ensure that end.

In that regard, the Association is currently considering the adoption of a policy statement to establish guidelines for the application of these programs and technologies to the basic educational objectives of colleges and universities.

We have defined distance education as "the process by which the education of a student occurs in circumstances where the teacher and the student are separated geographically so that face-to-face communication is not possible and the communication across this distance is accomplished by one or more technological media, most often electronic (interactive television, satellite television, computers, etc.)" (*See Part III of the report, "Distance Learning," Academe, May-June 1998, p. 32, for a more comprehensive definition and explanation*).

This definition enables us both to incorporate the wide range of distance learning offerings, from technologically delivered courses offered by virtual universities, to the variety of enhanced opportunities offered by more traditional institutions, and to avoid being sidetracked by the particular technology being utilized. We want to emphasize that distance education is a method of "education," and that it is the educational aspects that policymakers, within and without the academic community, need to consider. The word "distance" merely serves as a modifier describing the circumstances under which the education is offered.

The geographic separation between teacher and student may be considerable as in an internet-based course offered over the world wide web, or the distance may be slight, from the teacher's computer to the student's computer in a nearby campus building. Therefore, distance education may apply to both on-campus and off-campus courses and programs, as well as programs and courses offered for credit, and non-credit courses and programs which support the educational objectives of the institution.

Distance education in its contemporary forms invariably presents administrative, technical, and legal problems usually not encountered in traditional classroom settings. For example, questions of copyright in materials adapted from traditional classroom settings or created expressly for distance education must be considered and resolved. Traditional principles of sound academic procedure will often apply to these new media, either directly or by extension, but they will not cover all conceivable circumstances. When they fail to do so, new principles and procedures must be developed by means of which these new media may be made to serve most effectively the basic educational objectives of our institutions.

The general premise of the AAUP is that the use of these new technologies in teaching and scholarship should be for the purpose of advancing the basic functions of colleges and universities to preserve, augment, criticize, and transmit knowledge and to foster and enhance the abilities of a student to learn. The development of appropriate institutional policies concerning these new technologies as instruments of teaching and scholarship is therefore the responsibility of the academic community.

### **Association Recommendations on Copyright Law in the context of Distance Education**

In the area of copyright law itself, the Association has taken a strong stand in favor of extending the principles of fair use to both broadcast and electronic communication networks in *an educational setting*. At the same time the AAUP remains committed to the protection of the intellectual property rights of faculty creators of distance education courses and other scholarly works. Because of this dual commitment, we urge the Copyright Office to ensure that any

changes in Title 17 are based on a careful definition of distance education that incorporates the traditional standards of academic practice in higher education.

**I. Therefore we argue that particular attention be paid to "the recipients of such programs," the "communities served," and "the level [of] programs offered."**

Our concern here is to clarify the nature of the programs being offered, to ensure that they are bona fide educational offerings, designed to preserve, augment, criticize, and transmit knowledge and to foster and enhance the abilities of a student to learn. It is appropriate to extend fair use principles into all applications that are bona fide higher education uses, because higher education itself carries out a public good. It is appropriate to limit the application of fair use to bona fide educational uses, in order to protect the property rights of creators in the commercial realm.

As you know in the last session of Congress, Senator Ashcroft offered S. 1146, The Digital Copyright Clarification and Technology Education Act of 1997, which addressed some of these questions. However, in expanding the provisions of Section 110(2) of the Copyright Act, we believe that the Ashcroft bill went too far.

We have identified at least four factors that would need further clarification in any re-working of exemptions, including:

- ◆ the kind of works covered;
- ◆ the type of institutions that can transmit protected works;
- ◆ the acceptable category of recipient, and;
- ◆ the appropriate place of reception.

We also believe that attention must be paid to the question of security restrictions in order to prohibit rebroadcast or retransmission to others outside the higher education context. We would not like to see educational purposes used to create an exemption that would undermine the legitimate rights of creators.

To protect the interests of those who create new material or material adapted from traditional courses for use in distance education and to protect the educational objectives of the institution, accurate and intelligible information about copyright law and how it may or may not affect distance education programs should be provided. Provision should also be made so that the original teacher-creator, the teacher-adapter, or an appropriate faculty body can exercise control over the future use and distribution of recorded material and can initiate periodic reviews to determine whether the recorded material should be revised or withdrawn from instructional use because of obsolescence or for any other reason the teacher or faculty body determines.

***AAUP recommends that any proposed exemption be carefully limited to educational programs offered to students.***

**II. The accrediting of such programs should also be a factor in creating any new or amended exemption for distance education.**

At its best the accrediting process in American higher education has consisted of a voluntary system providing expert, but disinterested, quality control. The Association's concerns about the accreditation of higher education institutions are set forth in the statement, *The Role of the Faculty in the Accrediting of Colleges and Universities*. The statement is addressed to the processes of the accrediting commissions of regional associations, but the principles and standards articulated in the statement also apply to professional and specialized accrediting processes as well. The statement emphasizes that faculty members "exercise a special responsibility as the segment of the educational community which is in the best position to recognize and appraise circumstances affecting academic freedom, faculty tenure, the faculty role in institutional government, and faculty status and morale. "

By their nature, distance education programs can subvert the substantive roles of regional accrediting commissions.. The most obvious example of this problem, the Western Governors' University, a "virtual entity," has its administrative headquarters in Utah and its academic headquarters in Colorado, and its proposed member entities are located in additional regions as well. But the principle involved can apply to any program offering distance education courses over broadcast or digital technology. AAUP will be working with accrediting agencies to address these problems.

***AAUP recommends that the Copyright Office limit any exemption to accredited educational offerings.***

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**III. Programs eligible for possible exemption should be those that are approved by the appropriate faculty bodies which determine curriculum matters.**

The Association believes that the principles articulated in the 1966 *Statement on the Government of Colleges and Universities* apply to any technological forms used to deliver the educational content, and that the respective roles of faculty and administration in designing the education mission of the institution apply with equal force to distance education curriculum as in traditionally presented courses.

The Association contends that policy and content decisions regarding distance education represent curriculum issues. Therefore, as with all other curricular matters, the faculty should have primary responsibility for determining the distance-education policies of the institution. Before they are offered, all programs and courses for academic credit which utilize distance-education technologies should be considered and approved by the faculties of the department, division, school, college, or university, or by representatives of those bodies that pass upon curricular matters generally. These procedures should apply to all such courses and programs, including those recorded in some way, that is, those which do not require the teacher's active

presence on a regular basis. The faculty should determine the amount of credit toward a degree a student may earn in courses utilizing the technologies of distance education.

If the institution prepares courses and programs for use by entities outside the institution, whether for academic credit or not, whether recorded or requiring the regular active presence of the teacher, the faculty should ensure that the same standards of appropriateness and excellence obtain as in courses and programs prepared for use in their own institution.

***AAUP recommends that the Copyright Office limit any exemption to educational programs approved by the appropriate faculty bodies.***

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**IV. Finally, we would urge the Copyright Office to base any distance education exemption in the Copyright Statute on the *nature of the educational setting*, rather than on any particular technology.**

Technological changes are occurring so rapidly and in such an unforeseen manner that tying changes to specific technologies will almost inevitably mean that the law would have to be revisited constantly. Many of the questions in the December 23, 1998 Federal Register notice refer to the differences in technology-based education and traditional face-to-face education. Many of the questions cannot be answered with any degree of specificity.

The Association believes that these questions should be approached conceptually. The development of new technology has a great deal of impact on how one understands the concept "classroom," for example, but regardless of the technology used, a classroom is still a controlled interaction between a teacher and a student in order to transmit knowledge and understanding. That concept can apply over the internet, within the four walls of a traditional room, or over a television broadcast.

We recognize the ambiguities inherent in the application of fair use principles to the classroom, however the classroom is defined. In fact, the Association has struggled with those ambiguities for some time. AAUP opposed the voluntary guidelines included in the legislative record of the 1976 Copyright Revision Bill because of their overly restrictive nature. Whether the ultimate recommendation of the Copyright Office is to deal with the "issues raised by digital distance education through specific exemptions like section 110 (2) or through a flexible balancing approach like fair use" we would urge you to focus on *the educational setting* ("the classroom") rather than a temporarily current mode of digital technology.

Any need for an exemption from exclusive rights of copyright owners for distance education through digital networks (and broadcast networks as well) should be based on the proposition that policies for the distance education classroom should be comparable to those for the traditional classroom. In other words, what is available for use in one classroom setting should be available in all classroom settings, regardless of the physical, technological, or geographical boundaries of that classroom setting.

The same proposition should govern policies that determine the categories of works to be included, and the extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption. We believe that accredited providers of higher education should be the parties who are entitled to the benefits of any distance education exemption, and that appropriately enrolled students of those accredited programs should be the parties who should be designated as eligible recipients of distance education materials under any distance education exemption.

However, because we do view the "classroom" as existing regardless of the physical, technological, or geographical boundaries, it is imperative that security restrictions be built into any proposed exemption to ensure that there is not unauthorized rebroadcast or retransmission outside of the educational context.

AAUP supports changing existing copyright law only to the extent necessary to clarify that fair use policies apply to the classroom, regardless of the physical, technological, or geographical boundaries of that classroom setting. We would oppose any change that treated digital transmissions differently from education through broadcasting or closed circuit technologies, or in a traditional classroom.

Specific exemptions like section 110(2) have provided educators with a much needed clarity in determining appropriate models of classroom instruction, but they have not preempted the need for more flexible balancing approaches like fair use. The Association believes that this type of a balanced approach will be necessary for the distance education environment.

We welcome this opportunity to present our views on the promotion of distance education through digital technology. We encourage any necessary changes to the Copyright Statute to apply the principles of fair use to the *distance education setting*. At the same time, we urge that any such changes are carefully limited to *appropriate educational settings*.

In summary, AAUP recommends:

***That any proposed exemption be carefully limited to educational programs offered to students.***

***That the Copyright Office limit any exemption to accredited educational offerings.***

***That the Copyright Office limit any exemption to educational programs approved by the appropriate faculty bodies.***

***That the Copyright Office base any exemption on the educational setting ("the classroom") rather than a temporarily current mode of digital technology.***